In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-80

WILLIAM ALLEN WHITEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-5037

HARRY LEE KELLER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-5079

CHARLES DOUGLAS WHITTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the prosecutor made a prejudicial statement in his closing argument.

After a jury trial in the United States District Court for the Northern District of Mississippi, petitioners were convicted of transporting stolen motor vehicles in interstate commerce and of conspiracy, in violation of 18 U.S.C. 2312 and 371. Whiten was sentenced to imprisonment for four years, Keller to imprisonment for five years, and Whitty to imprisonment for two years. The court of appeals affirmed without opinion (Whiten Pet. App.).

The evidence showed that petitioners and co-conspirator Fells drove four stolen motor vehicles from Chicago to Mississippi. Fells, who had pleaded guilty in a separate trial in Chicago, testified for the government in this case and related his involvement in the conspiracy (Tr. 269-286).

On cross-examination, counsel for petitioner Whiten attempted to attack Fells' credibility and question his motives for testifying. Fells was asked (Tr. 298):

> Q You were afraid to come down here to Mississippi, to come before this Court, weren't you, and go to trial in this case?
>
> A Yes. I didn't have no lawyer, or nothin'.
>
> * * * * *
>
> Q And you were really scared at that point, weren't you? You had missed a court date and you were in trouble; you had violated the provisions of your bond; you were really frightened, weren't you?
>
> A Yes, sir.

Counsel for Whiten then argued in summation (Tr. 411):

> And, if you listen to the testimony of Mr. Fells, he pled guilty for one reason, he was afraid to come down here and face trial in front of you all. He was

> afraid to come to Mississippi and stand in front of you all and say, I didn't know the cars were stolen. So he stayed up there in Chicago and he was given three years probation or suspended sentence. He didn't go to jail. And then he came down here and testified.* * *

In his closing argument the Assistant United States Attorney said (Tr. 437):

> Now, the individual that got up there on the stand by the name of Fells, he got up there, he was scared, he stated to you the facts of the case as he knew it. He didn't want to implicate anybody else. He was afraid to implicate anybody else, I submit to you. He got up there, he had to face the people that he came down here with. He wasn't thinking about justice in Mississippi, he was thinking about the streets in Chicago. That's what he was thinking about.

Objection on behalf of Whiten that this argument was improper was overruled. The prosecutor then continued, arguing that if Fells knew something was wrong with the cars, petitioners must have known the same (Tr. 437-438).

In context, these comments were not improper. It was the defense who first ventured into the field of Fells' motivation, suggesting that he had been afraid of being tried in Mississippi. The argument of defense counsel, as well as the questions earlier put to the witness, invited the government's response. Cf. *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15. Counsel has the right to make a reasonable reply to an argument raised by his opponent. See *United States* v. *Panepinto*, 430 F. 2d 613, 616 (C.A. 3), certiorari denied *sub nom. Orangio* v. *United States*, 400 U.S. 949.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09